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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 806

HOUSTON LIGHTING & POWER COMPANY,
Petitioner,

vs.

CITY OF WEST UNIVERSITY PLACE, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 806

HOUSTON LIGHTING & POWER COMPANY,
Petitioner,

vs.

CITY OF WEST UNIVERSITY PLACE, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

To the Supreme Court of the United States:

Houston Lighting & Power Company, a Texas corporation chartered to generate, transmit and distribute electricity for public use, respectfully prays this Court, by certiorari, to review and determine cause No. 7621 styled *H. T. Fleming et al.,* plaintiffs in error v. *Houston Lighting & Power Co.,* wherein the Supreme Court of Texas, the highest court of the State (Tex. Const., Art. V, Secs. 1, 3), has rendered final judgment in favor of the validity of Ordinance 129 of the City of West University Place, Texas, overruling all questions raised and denying all rights set up and claimed under the Federal Constitution by petitioner against said ordinance.

I. Summary Statement Of The Matter Involved.

Petitioner furnishes the electric service used in said City under a fifty year franchise granted and accepted in May, 1930. Ordinance 129, enacted January 4, 1938, conditions petitioner's use of City's streets,[1] commencing August 1, 1938, on the payment of annual rental. As the means of collecting this rental, the ordinance provides that petitioner's use of the streets in conducting its business without paying the prescribed rentals shall be unlawful and punishable by $100 a day penalties, and that City's cancelable receipt for the last annual rental payment shall constitute petitioner's authority to use the streets.

Petitioner filed this suit during February 1938 in the State District Court to enjoin enforcement of the ordinance, and the case was tried and determined on its merits in July, 1938 before the first payment under the ordinance became due. The evidence relied on by petitioner to show the invalidity of the ordinance under the State law and the Federal Constitution was entirely undisputed, respondents standing on the ordinance and offering no evidence.

The District Court held Ordinance 129 "in all things valid and constitutional and * * * in full force and effect" (R. 27) and denied relief. The Court of Civil Appeals held the ordinance void as a matter of State law, reversed the judgment of the trial court, and rendered judgment granting the permanent injunction sought. The Federal questions, which petitioner duly reserved and presented by assignments of error (R. 104), were not reached, the Court of Civil Appeals regarding their consideration as unnecessary in view of the non-Federal ground for its judgment.

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[1] City has no alleys at all (R. 87), and no parks or other public grounds of any consequence (R. 68A). Streets, avenues and boulevards are all described herein as "streets".

The Supreme Court of Texas granted writ of error, took jurisdiction of and decided the case [2] by judgment reversing the Court of Civil Appeals and affirming the judgment of the District Court. This judgment the Supreme Court made final by entertaining and overruling two successive motions for rehearing, both filed by petitioner as a matter of right.

II. Opinions Below.

No opinion in the case has been officially reported.[3]

III. Jurisdictional Statement.

1. The statutory provision relied upon to sustain jurisdiction is Section 237 (b) of the Judicial Code, as amended: 28 U. S. C. 344 (b).

2. Ordinance 129, the validity of which is involved, is set out verbatim in the record (pp. 15-18), having been attached to plaintiff's petition and introduced in evidence in the District Court (R. 15).

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[2] When a case is taken on petition for writ of error and decided on its merits, as this case was, "the Supreme Court is not only clothed with the power but charged with the duty to determine all properly presented questions of law requisite to a correct decision of the case". *Holland* v. *Nimitz* (1922), 111 Tex. 419, 430, 431. The petition, filed in the Court of Civil Appeals, brings to the Supreme Court the entire record including the assignments of error. Arts. 1742, 1743, R. C. S., Tex., 1925. The party who has obtained reversal of an adverse judgment in the Court of Civil Appeals is entitled to a determination by the Supreme Court of all assignments of error necessary to a correct judgment of the case. *Panhandle Const. Co.* v. *Lindsey* (1934), 123 Tex. 613, 623. Accord: *Chapman* v. *Crichet* (1936), 127 Tex. 590, 596.

[3] The pages of the record and the unofficial reports where the three opinions filed in the case may be found are: (1) Court of Civil Appeals, opinion filed April 27, 1939 (R. 95), 128 S. W. (2d) 487; (2) Supreme Court of Texas, opinion adopted April 3, 1940 (R. 106), 138 S. W. (2d) 520, and opinion on rehearing adopted October 30, 1940 (R. 115), 143 S. W. (2d) 923.

The ordinance is set out here in footnote 4 with those sections omitted which are deemed not pertinent to the Federal questions involved:

3. The date on which the judgment of the Supreme Court of Texas sought to be reviewed became final is December 4, 1940. The judgment was entered April 3, 1940 (R. 111). Petitioner's first motion for rehearing (R. 112), duly filed as a matter of right (Art. 1762, R. C. S. Tex., 1925), was overruled October 30, 1940 (R. 116), pursuant to opinion on rehearing (R. 115). Petitioner's second motion for rehearing was filed November 13, 1940 (R. 118) in accordance with an order of the Supreme Court directing its Clerk to enter such motion on the Court's motion docket where "it will be duly entertained and determined by this Court

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[4] ORDINANCE No. 129

An ordinance fixing rentals to be paid by telegraph, telephone, electric, and gas companies for the privilege of using with their poles, wires, conduits, pipes, and fixtures the streets, easements, and alleys and other public ways within the City of West University Place, Texas, providing penalties for violation, and providing an emergency.

Be it ordained by the Board of Commissioners of the City of West University Place, Texas:

SEC. 1. That all persons, associations, organizations, and corporations using or maintaining any telegraph, telephone, electric light or other poles, gas pipe lines, pipes and other fixtures in any of the streets, highways, easements, alleys, parks or other places within the corporate limits of the City of West University Place, Texas, shall on the 1st day of August of each and every year file with the City Secretary a sworn report showing the gross receipts from the business conducted by such persons, associations, organizations and corporations within the corporate limits of the said city for the preceding year ending June 30th.

(SEC. 2, wherein City reserves power to examine company records to verify sworn reports, omitted.)

SEC. 3. That upon the 1st day of August of each and every year, every person, association, organization, or corporation occupying or using the streets, highways, easements, alleys, parks or other public places in the City of West University Place, Texas, with poles, pipes, and for other fixtures shall as a condition to such further occupancy pay to the city annually for such privileges a rental equal of four (4%) per cent of the gross receipts received by such person, association, organization, or corporation from its business con-

* * *" (R. 118). The Supreme Court overruled the second motion, "after due consideration of same", but without opinion, on December 4, 1940 (R. 120).

4. *The Federal questions were properly raised by plaintiff's petition filed in the District Court:* Petitioner, as plaintiff in the District Court, after averment of the facts in respect to petitioner's use of the streets to furnish service in the area from about 1920 to 1925, when the City was incorporated, and from 1925 until May, 1930, when the fifty year franchise was granted and accepted (R. 2-4), attached to plaintiff's petition a copy of said franchise, of petitioner's acceptance of said franchise and of Ordinance 129 (R. 12-18), and alleged:

12.

"Inasmuch as enforcement of said Ordinance 129 will impair the obligation of the franchise contract between City and company as herein above alleged, said

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ducted in the corporate limits of the City of West University Place, Texas, for the preceding year which sums shall be paid to the City of West University Place, Texas.

SEC. 4. That upon receipt of the above rental by the city, the City Secretary shall deliver to the person, association, organization, or corporation paying the same a receipt for such rental, which said receipt shall authorize such person, association, organization, or corporation to use and occupy the streets, highways, easements, alleys, parks and other public ways of the City in carrying on its business for twelve (12) months from August 1st of such year.

SEC. 5. That the rental for the privilege of using the streets, alleys, highways, easements, and public places of the City of West University Place provided for in this ordinance is not charged as a tax, but is made for the privilege now enjoyed and to be enjoyed by such persons, associations, organizations, and corporations of using the streets, easements, alleys, and other public ways of the city in the conduct of their respective businesses; and such charges are additional to all ad valorem and franchise taxes and to all taxes of every nature whatsoever against the persons, associations, organizations or corporations mentioned herein.

SEC. 6. That nothing herein is intended to relieve any person, association, organization, or corporation of any condition, restriction or requirement imposed by any law or ordinance of the said City of West University Place, Texas.

SEC. 7. That this ordinance does not grant a franchise to any utility or per-

ordinance is void because it violates section 10, Article I of the Constitution of the United States; and inasmuch as the enforcement of said ordinance will deprive plaintiff of its said property without plaintiff's consent and without compensating plaintiff therefor, said ordinance denies plaintiff due process of law and the equal protection of the laws, contrary to section 1 of the Fourteenth Amendment to said Federal Constitution (R. 7).

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son, association, organization or corporation to use the streets, easements, alleys and other public ways and shall never be so construed by the courts or otherwise, and the city reserves the right to cancel the privileges granted hereunder and refund the unearned rentals paid to the city.

(SEC. 8, wherein City reserves right to make other restrictions and regulations of poles, lines and equipment effective, omitted.)

SEC. 9. That every person, association, organization, and corporation who shall operate any business without the payment of the rentals provided for herein shall be subject to a penalty of One Hundred ($100.00) Dollars for each and every day that such person, association, organization, or corporation shall conduct such business using and occupying the streets, easements, alleys, or other public ways of the City of West University Place without the payment of the said rentals which said sum may be recovered by the City of West University Place in a court of competent jurisdiction by a suit filed therein.

(SEC. 10, wherein failure or refusal of any such company or its agent to report gross receipts annually or permit examination of company books is made offense punishable by fine not to exceed $100, each day to constitute a separate offense, omitted.)

(SEC. 11, which requires City's fire marshal and other designated employees to inspect utility lines and cause unsafe conditions to be corrected, is omitted because counsel for respondents stated on the record that City would not attempt to sustain the validity of the ordinance on the ground that it imposed a "license tax" or "tax under the regulatory power" (R. 85, 86). This statement was made during petitioner's proof that inspection of its equipment by City employees was not justified because of petitioner's own inspection system and use of automatic safety devices (R. 79-81; 92-94).

(SEC. 12, partial invalidity saving clause, omitted.)

SEC. 13. That the fact that telegraph, telephone, electric, and gas companies have been occupying and using the streets, easements, alleys and other public ways of the City of West University Place, Texas, for many years without the payment of rent for such use creates an emergency, and this ordinance shall take effect immediately upon its passage, approval and publication as required by law.

Passed and approved this January day of 4 A. D. 1938.

(Signatures omitted.)

13.

Plaintiff says that the recitals of said Ordinance 129 characterizing the levy provided therein as a rental charge for plaintiff's said occupancy of said streets are a pretext by which the City is attempting to disguise its attempt to exercise a taxing power which it does not possess. In support of this allegation, plaintiff has averred above that said City does not have the power to rent out its streets for the maintenance and operation thereover, therein and thereunder of plaintiff's said electric service property installed pursuant to said Article 1436 of the Texas statutes, and to said contracts and dedications of said landowners and subdividers and to said franchise granted to plaintiff by the City in 1930. Furthermore, said levy—being 4 per cent of the total gross receipts derived from plaintiff's ownership and operation of its electric generating, transmission and distribution property in the conduct of its business of furnishing electric service in said City—bears no reasonable or rational relationship to plaintiff's said occupancy of said streets, in that said levy is not related to the extent, or the manner, or the duration of said occupancy, but is related solely to the gross proceeds derived from said business and is a direct charge on said business. In so far as said levy is a charge upon property used to conduct plaintiff's said business by taking a fixed per cent of the proceeds derived from the use thereof, said charge is laid upon all the property so used, without regard to the location and operation of said property within or without said City, or whether or not occupancy of said streets is involved in the installation and operation thereof. In this connection, plaintiff shows that more than 70 per cent of the investment in property used and useful to furnish electric service in said City is represented by property located and operated outside the City's boundaries, that of about 25 miles of pole lines now installed in said City, only about 12 miles are located in said streets, and that of said 12 miles, approximately 4½

miles were installed prior to the incorporation of said City or its annexation of the area where said lines are installed. By reason of these facts, plaintiff says that Ordinance 129 is void because the levy provided thereby is unreasonable as applied by the City to plaintiff and its said property and business, and is repugnant * * * to * * * Sec. 1, 14th Amendment, Fed. Constitution" (R. 8).

17.

Plaintiff is not presently in need of injunctive relief against the enforcement of said street rental ordinance, but will be prior to August 1, 1938. Plaintiff filed this suit in February, 1938, after failing in its effort to secure a repeal of said ordinance, in order to test the validity thereof by trial of this suit on its merits prior to the time provided for the first report and payment under said ordinance. The loss and damage to plaintiff of the kinds and in the amounts heretofore alleged, will be irreparable. Unless said ordinance is set aside, the aggregate payments required of plaintiff thereunder for the unexpired term of its said franchise, assuming that plaintiff's said gross receipts will be the same as for 1937, will exceed $100,000. There is no method provided by statute or otherwise whereby plaintiff can pay over to said City the amount required to be paid on August 1, 1938, and still be secure in the full protection of its rights and in the certain recovery of said payment if said Ordinance 129 is subsequently found to be invalid.

Hence plaintiff is without a plain, complete, adequate and speedy remedy at law, and brings this action to prevent a multiplicity of suits, to protect its constitutional and statutory rights and immunities, and to restrain the great and irreparable injury and damage which plaintiff will suffer in its property and property rights if said ordinance is enforced" (R. 10).

5. *The questions raised and rights claimed under the Federal Constitution by petitioner were overruled and de-*

nied by the judgment of the District Court: The pertinent parts of this judgment are:

> "It is therefore ordered, adjudged and decreed that said ordinance No. 129 of the City of West University Place, which is here in controversy, is in all things valid and constitutional and is in full force and effect.
>
> It is further ordered, adjudged and decreed that the injunction and all other relief prayed for by plaintiff against each and all of the defendants herein is denied and refused.
>
> It is further ordered, adjudged and decreed that each and every issue in this case is adjudged against the plaintiff and in favor of the defendants" (R. 27).[5]

The Court of Civil Appeals overturned Ordinance 129 and gave petitioner the protection sought for its Federal constitutional rights upon nonfederal grounds (R. 102, 103), and did not pass upon the Federal questions duly reserved and presented by petitioner's assignments of error (R. 104).

6. *The questions raised and rights claimed under the Federal Constitution by petitioner were overruled and denied by the final judgment of the Supreme Court of Texas affirming the judgment of the District Court:*

The opinion adopted April 3, 1940 (R. 106), did not mention the raising of or set forth findings or conclusions passing expressly upon several of the nonfederal questions or any Federal question presented by the assignments. Petitioner's first motion for rehearing included the following grounds:

> "Fifth Ground.
>
> "The Supreme Court of Texas erred in refusing to consider, determine and sustain the question of law presented by company's Fifth Proposition, namely,

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[5] Petitioner reurged each Federal question by motion for new trial (R. 27), which motion the District Court overruled (R. 29).

"'Ordinance 129 unconstitutionally impairs the obligation of the contracts with the State and the City under which appellant has occupied and is using the streets,'

under the Fifth Assignment of Error, which reads:

"'The Court erred in refusing to hold that said Ordinance 129 is repugnant both to Sections 16 and 29, Article I, Texas Constitution and to clause 1, Section 10, Article I, Federal Constitution, in that said ordinance impairs the obligation of the contract made by plaintiff's acceptance of the City's said ordinance of May 29, 1930.'

"Seventh Ground.

"The Supreme Court of Texas erred in refusing to consider, determine and sustain company's Sixth Assignment of Error in so far as it reads as follows:

"'The Court erred in refusing to hold that said ordinance will operate to deprive plaintiff of its said street easements, together with the property installed therein and dependent thereon, without due process of law, and will deny plaintiff the equal protection of the laws, contrary to Section 1, Fourteenth Amendment, Federal Constitution.'

"Tenth Ground.

"The Supreme Court of Texas erred in refusing to hold that the annual charge levied on company by Ordinance 129 is so arbitrary and unreasonable as to deprive company of its property without due course or process of law, contrary to Section 19, Article I of the Texas Constitution and Section 1 of the Fourteenth Amendment to the Constitution of the United States" (R. 113-114).

Petitioner prayed the Supreme Court to:

"3. Pass on and sustain all the questions raised under the State and Federal Constitutions against the validity of the ordinance" (R. 114).

This motion was overruled October 30, 1940 (R. 116), pursuant to an opinion on rehearing which expressly overruled petitioner's assignments urging that Ordinance 129, as a matter of substance, levied an excise tax, but which did not mention or pass expressly upon any of the grounds of the motion reurging the assignments presenting Federal questions (R. 115).

Petitioner calls attention to its application filed (R. 116) and granted (R. 117) November 6, 1940, for an order directing that a seasonable second motion for rehearing be filed, entertained and determined, to its second motion for rehearing filed November 13, 1940, and the grounds of said motion (R. 118), to the order filed December 4, 1940, overruling said second motion for rehearing without opinion (R. 120), to petitioner's motion for a certificate by the Justices of the Supreme Court of Texas that the Federal questions had been presented, entertained and overruled (R. 120), to the appendix attached to this motion tracing the raising and presentation of the Federal questions at every stage of the cause in the State courts (R. 121), and to the order entered January 22, 1941, overruling the motion for certificate without opinion or explanation (R. 123).[6]

7. Ordinance 129, having been finally sustained by the highest court of the State, is a law passed by the State within the meaning of Art. I, Sec. 10, Cl. 1 of the Federal Constitution (*Cuyahoga Pow. Co.* v. *Akron,* 240 U. S. 462, 464; *Lovell* v. *Griffin,* 303 U. S. 444, 450; *Carlson* v. *California,* 310 U. S. 106, 109), and is a statute of the State within the meaning of Sec. 237 of the Judicial Code, amended (*Zucht* v. *King,* 260 U. S. 174, 176).

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[6] The rule that "a motion for rehearing which is duly presented within fifteen days from the date of the last opinion in the case will be filed, entertained and determined" (R. 117) is an unwritten rule based upon customary practice and evidenced only by verbal instructions to the Clerk.

8. *The questions involved are substantial:* They were seasonably and properly raised and urged against the validity of the ordinance from the time the suit was filed at every stage of the litigation in the State courts; their grounds are that the ordinance is repugnant to the Federal Constitution; they set up rights and immunities under the Federal Constitution and appeal for a judicial remedy to prevent infringement; and this remedy was denied by final judgment of the highest court of the State in favor of the validity of the ordinance and declaring it to be in full force and effect. An appeal could be taken as a matter of right (Sec. 237 (a), Jud. Code, amended) because, unlike the questions involved in *Zucht* v. *King, supra,* these questions were decided below in a way not in accord with the applicable decisions of this Court.

IV. Questions Presented.

1. Does Ordinance 129 impair the obligation of petitioner's franchise?

(Petitioner contends that this question was decided in a way that is not in accord with *Texarkana* v. *Arkansas Gas Co.*, 306 U. S. 188, 198-202; *Boise Water Co.* v. *Boise City,* 230 U. S. 84, 92, 93, and *Russell* v. *Sebastian,* 233 U. S. 195, 204.)

2. Does the enforcement of the ordinance deprive petitioner of the use of said franchise without due process of law?

(Petitioner contends that this question was decided in a way that is not in accord with *Boise Water Co.* v. *Boise City* and *Russell* v. *Sebastian, supra;* and *Louisville* v. *Cumberland Tel. Co.,* 224 U. S. 649, 661-664.)

3. (a) Is the ordinance arbitrary and oppressive?

(Petitioner contends that this question was decided in a way that is not in accord with *Home Bldg. & Loan Assn.*

v. *Blaisdell,* 290 U. S. 398, 434, 439, 445; *St. Louis* v. *Western Union Tel. Co.,* 148 U. S. 92, 97; *New Jersey Tel. Co.* v. *Tax Board,* 280 U. S. 338, 348, 349.)

(b) Did the Supreme Court of Texas refuse to determine the Federal question of reasonableness upon evidence?

(Petitioner relies on *Nashville, C. & St. Ry.* v. *Walters,* 294 U. S. 405, 415, 416.)

4. Did the Supreme Court of Texas deny petitioner its Federal constitutional rights by deciding the case in a way that is not in accord with Article VI, Clauses 2 and 3 of the Federal Constitution?

(Petitioner relies on *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 340, 341, 342, 344, 347-349, and *Lawrence* v. *State Tax Comm.,* 286 U. S. 276, 282.)

V. Reasons Relied On for the Allowance of the Writ.

1. The validity of Ordinance 129 was drawn in question as being repugnant to the Federal Constitution and its validity sustained. *Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95, 99. Contract and property rights protected by the Federal Constitution (*Russell* v. *Sebastian,* 233 U. S. 95, 204) were properly set up and their infringement claimed, and the infringing legislation has been upheld by the highest court of the State. *Lawrence* v. *State Tax Comm.,* 286 U. S. 276, 282.

2. The highest court of the State has decided Federal questions of substance in a way not in accord with the applicable decisions of this Court. See decisions cited under IV Questions Presented, *supra,* pp. 12, 13.

3. *The questions are of general public importance:* The wider availability of electric service through lower cost to the user—in the home, on the farm and for defense—is a national aim. Franchises to maintain lines over public

thoroughfares are an essential part of the right of way for that service. The integrity of that right of way depends upon the sanctity of the franchise contract and protection of the property rights created thereunder.

The purpose of the infringing legislation is not public. The need to restrain arbitrary use of penal legislation to serve private ends is never more pressing than at a time when the scope of sovereign power is being extended. Cf. *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 434, 438, 439; *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, 431, 432; *Worthen Co.* v. *Kavanaugh,* 295 U. W. 56, 60, 62; *Treigle* v. *Acme Homestead Co.,* 297 U. S. 189, 197; *Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95, 109.

A foundation rule of property is that a grant not only conveys the title granted, but implies a contract not to reassert that title against the grantee. *Fletcher* v. *Peck,* 6 Cranch 87, 136-139. The holding of the State court has far-reaching significance. It is that the grantor of the right of way easement for an essential form of public utility service, after the grant has been made and while it is being acted upon, may rescind the grant for the purpose of collecting a new consideration for the further use of that right of way.

A review is necessary, in the interest of the law, to maintain uniformity of decision upon rights and immunities protected by the Federal Constitution. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 347, 348.

SUPPORTING BRIEF.

VI. Statement of the Case.[7]

Petitioner's electric system centers in Houston where its main generating plants are located (R. 72A, 73) and furnishes electric service in all or parts of nine adjoining counties (R. 75). Generating plants, transmission lines and substations consist of 70 per cent of the investment used to furnish the service (R. 76) and none of these classes of property is located or operated within the City of West University Place (R. 72A).

Petitioner installed its lines in the area now comprising said City in 1920 and began service in 1921 (R. 64) under authority of the State statute providing the right of way powers and privileges of electric corporations.[8] The area was not incorporated as the City of West University Place until 1925 (R. 63), and petitioner continued to furnish service therein as before[9] until petitioner's fifty year franchise was granted May 29 and duly accepted May 31, 1930 (R. 12).

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[7] This statement is intended to be read with the Summary Statement and Jurisdictional Statement of the petition, *supra*, pp. 2-3; 3-12.

[8] Art. 1436. Right of way.—Such corporation shall have the right and power to enter upon, condemn and appropriate the lands, right of way, easements and property of any person or corporation, and shall have the right to erect its lines over and across any public road, railroad, railroad right of way, interurban railroad, street railroad, canal or stream in this State, any street or alley of any incorporated city or town in this State with the consent and under the direction of the governing body of such city or town. Such lines shall be constructed upon suitable poles in the most approved manner and maintained at a height above the ground of at least twenty-two feet; or pipes may be placed under the ground, as the exigencies of the case may require. (Acts, 1911, p. 228.)

[9] There is no Texas decision defining the franchise rights of a utility which has begun service in an area which is unincorporated after that area becomes a municipal corporation. For the general rule, see Note, *Cloverdale Homes* v. *Cloverdale*, 47 L. R. A. (N. S.) 607, and *Tulsa* v. *S. W. Bell Tel. Co.*, 75 F. (2d) 343, 356.

1. *Petitioner's franchise:*[10] City's obligation is to grant petitioner, "its successors and assigns, the right, privilege and franchise" to use City's present and future public thoroughfares and grounds for electric poles, lines and fixtures for fifty years, Secs. 2, 8 (R. 13, 14).[11]

There is no dispute about the existence or nature of the franchise contract (*Cf. Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 100) or about petitioner's full compliance with the obligations of the franchise and of the undertaking. Respondents stipulated in the District Court that "said franchise is now in full force and effect."[12]

2. *Ordinance 129:* The ordinance was passed (Jan. 4, 1938) without giving petitioner notice or hearing (R. 4, 90). Failing to get the ordinance repealed as to it, petitioner promptly (Feb. 16, 1938) filed this suit (R. 1, 10).

(a) *Purpose of the ordinance:* The ordinance is entitled one "fixing the rentals to be paid by" the four types of utility company named therein "for the privilege of using with their poles, wires * * * and fixtures the streets * * * within the City" and declares (Sec. 13) that the fact that this use has been made by these companies "for many years without the payment of rent" creates an emergency (R. 15, 18). City's mayor testified that the ordinance was passed to raise revenue to meet the expense of running the municipal government and that August 1 was fixed as the date for paying the rental because that was the time of year

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[10] The franchise is not exclusive. See Sec. 6 (R. 14) and compare *Ennis Water Works* v. *Ennis*, 233 U. S. 652, 657, 658.

[11] Petitioner's obligations are to interfere as little as possible with traffic (Sec. 3), to furnish first class service (Sec. 4), to hold City harmless (Sec. 5) and to maintain City of Houston rates for residential and commercial service and rules for extension of service (R. 13, 14). An additional consideration for granting the franchise was the lower rate for municipal water pumping obtained by City under the rate schedule applying in cities where petitioner's property and right to do business are protected by franchise (R. 66).

[12] The case was tried July 25-29, 1938 (R. 26).

City's tax collections were smallest (R. 89, 90). Respondents' counsel stipulated in the District Court that the ordinance was being defended as imposing a rental, not a "license tax" or "tax under the regulatory power" (R. 85, 86).[13] The Supreme Court held, on rehearing, that Ordinance 129 imposes a rental charge, in accordance with the distinction between rental charges and excise taxes pointed out in *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 92, 97, wherein a rental charge was defined as "in the nature of a charge for the use of property belonging to the city—that which may properly be called rental", as "a demand of proprietorship" and not "a demand of sovereignty" (citing *State Freight Tax* case, 15 Wall. 232, 278) and as a charge graduated in amount by the amount the streets are used and of such nature that the "amount to be paid is not graduated by the amount of the business".[14]

(b) *The practical operation and effect of Ordinance 129, as construed and upheld, on petitioner's franchise:* The ordinance operates on the franchise grant itself,[15] the frankly avowed purpose being to increase its burdens

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[13] The State police power cannot be used to raise revenue, except as incidental to police regulation and in an amount reasonably necessary to defray the cost thereof, and when the primary purpose of legislation imposing a charge is to raise revenue, the act must be sustained, if at all, under the tax power. The *Chain Store Tax* cases (*Hurt* v. *Cooper*), 130 Tex. 433, 438, decided in 1938. Accord: *Hoefling & Son* v. *San Antonio* (1892), 85 Tex. 228, 232. Respondents' stipulation that Ordinance 129 was being defended solely on the ground that it levied a rental charge was made during petitioner's proof, which is not disputed, that inspection of petitioner's lines by City employees is unnecessary because of automatic safety devices and petitioner's own inspection system (R. 79-81; 92-94).

[14] The St. Louis pole charge ordinance was finally held invalid as impairing the obligation of contract and being excessive in amount. *St. Louis* v. *Western Union Tel. Co.*, 63 Fed. 68, 72, 76: aff. 166 U. S. 388 (on failure to properly reserve questions for review).

[15] The distinction made is between the primary reciprocal obligations of a franchise, i. e., the grant of right of way for public utility service in return for grantee's undertaking to furnish that service, and the other obligations of the contract, such as the rates to be charged for the service. No case has come

(*Boise Water Co.* v. *Boise City*, 230 U. S. 84, 92; *Columbia Ry.* v. *South Carolina*, 261 U. S. 236, 251. As the means to this end, the ordinance makes petitioner's further use of the streets under the franchise [16] unlawful and subject to penalties of $100 a day (Sec. 9), requires petitioner to accept and recognize City's receipt for the annual rental payment as the sole authority for use of the streets thereafter (Sec. 4), and reserves to the City the right to cancel the authority conferred by the receipt (Sec. 7) by refunding "the unearned rentals paid to the City" (R. 16).

3. *The holding of the Court of Civil Appeals:* This Court held that petitioner's franchise was a grant from the State under Article 1436 (*supra*, p. 15) and that Ordinance 129 was void because the payment of compensation for the franchise was not a condition which City was authorized by the statute to impose when granting its consent to the use of the streets for electric service.[17]

4. *The holdings of the Supreme Court:* The Court held that franchises for electric distribution were not granted

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before this Court from Texas in which it has been seriously contended that the accepted franchise grant itself is not a contract *pro tanto*. Cf. *San Antonio Trac. Co.* v. *Altgelt*, 200 U. S. 304, 308, cited with approval in *Dallas Ry. Co.* v. *Geller* (1925), 114 Tex. 484, 488.

[16] That is, under the terms of the franchise as offered and accepted, and as interpreted by the parties from May 31, 1930 to August 1, 1938. Cf. *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 118.

[17] The court relied principally upon *Galveston & W. Ry. Co.* v. *Galveston* (1897), 90 Tex. 398, 412, 413, holding void the section of a railroad franchise granted by the City of Galveston which conditioned the grant on the extension of the railroad across Galveston Bay in 5 years and upon *Ft. Worth Gas Co.* v. *Latex Oil & Gas Co.*, 299 S. W. 705, 709, writ refused Dec. 1927, 118 Tex. 674, holding that a city charter provision requiring that a gas franchise become effective only if approved at a referendum election was inconsistent with Art. 1497, R. C. S., Tex., 1925, which statute granted right of way over streets "with the consent and under the direction of the governing body of such city or town".

by the State under Article 1436, but were granted by the city or town which, under Article 1016,[18] had exclusive control of its streets, and hence could condition a franchise granting their use for electric distribution lines upon the payment of compensation for the privilege granted (R. 110). The Court held that "the authorities above considered clearly sustain the right of cities to fix a rental charge for the use of its streets * * * by electric corporations which carry on a local business" (R. 110). The effect of this ruling, when applied to the facts of this cause, is to hold that a Texas city is empowered to impose a rental charge by such an ordinance as Ordinance 129 upon the holder of such a franchise as petitioner's.

The Court ruled that Ordinance 129 "is not invalid merely it provides for measuring the amount of the rental charge by a percentage" of petitioner's gross receipts in City, that "the material inquiry is not the method used to measure the rental charge, but rather the reasonableness of such charge" (R. 111) and that it could not be held as a

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[18] Art. 1016. Streets and alleys, etc.—Any incorporated city or town containing not more than five thousand population in this State shall have the exclusive control and power over the streets, alleys, and public grounds and highways of the city, and to abate and remove encroachments of obstructions thereon; to open, alter, widen, extend, establish, regulate, grade, clean and otherwise improve said streets; to put drains or sewers therein, and prevent incumbering thereof in any manner, and to protect same from encroachment or injury; and to regulate and alter the grade of premises; to require the filling up and raising of same; and such city council shall also have power to alter or vacate the alley in any block of ground in the city upon written application of the owner of the block, or if there be more than one owner of such block, then upon the written application of all owners thereof uniting in such application; such alley so vacated shall thereupon revert to and become the property of the owner of the block of which it was a part, or if more than one, then to the owners of the adjoining lots therein, each extending to the center of the alley so vacated. (Acts 1889, p. 1; Acts 1913, p. 326; Acts 1917, p. 351; G. L. vol. 9, p. 1029.)

matter of law, that the charge here "is so unreasonable as to render the ordinance invalid".[19]

VII. Specification of Errors.

1. The Supreme Court of Texas erred in holding Ordinance 129 valid, and in refusing to hold that said ordinance is void because it impairs the obligation of petitioner's franchise contrary to Art. I, Sec. 10, Cl. 1 of the Federal Constitution.

2. The Supreme Court of Texas erred in refusing to hold Ordinance 129 repugnant to Sec. 1 of the 14th Amendment of the Federal Constitution:

(a) On the ground that the enforcement of said ordinance will deprive petitioner of the use of its franchise without due process of law;

(b) On the ground that the purpose of such ordinance is not governmental;

(c) On the ground that the means provided in the ordinance do not bear the requisite legal relation to the purpose and are arbitrary and oppressive.

3. The Supreme Court of Texas erred in denying petitioner the kind of determination of its Federal constitutional rights required by Art. VI, Cl. 2 and Cl. 3 of the Federal Constitution.

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[19] Reference has been made (*supra*, p. 17) to the holding on rehearing that the ordinance imposes a rental charge. The statement in the opinion on rehearing that it would be possible for petitioner to conduct its business in City without using the streets (R. 115), asserts a physical impossibility. City comprises 275 blocks, each block being separated from every other block on all four sides by streets (R. 87, 70A).

BRIEF OF ARGUMENT.

Summary of Argument.

Under the law of Texas, petitioner's franchise constitutes a contract and a substantial property right and the purpose of the subsequent rental ordinance is not public. The rental ordinance is repugnant to the Federal Constitution because it impairs the obligation of the franchise and deprives petitioner of its use without due process of law. The ordinance is arbitrary and oppressive because it employs a single element of the business, gross receipts, to measure the street rental charge and the amount of the charge is not graduated by the amount the streets are used or by the rental value of the street easement. The State court did not determine the Federal question of reasonableness upon evidence.

The Supreme Court of the State did not determine petitioner's Federal constitutional rights as required by Article VI, Clauses 2 and 3 of the Federal Constitution and by the decisions of this Court.

ARGUMENT.

1.

Petitioner's franchise constitutes a contract and a substantial property right.

As far as the primary contractual obligations created by the offer and acceptance of the franchise grant itself are concerned, the rule stated has always been the settled rule of law in Texas [20] and it was also settled, at the time pe-

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[20] In *Mayor* v. *Houston St. Ry. Co.* (1892) 83 Tex. 548, the Supreme Court of Texas, in affirming judgment restraining the City of Houston from interfering with the laying of tracks along a street covered by the company's fifty year street railway franchise (p. 554), reviewed the charter powers granted the company to furnish street railway service and the charter powers granted the City to control the use of its streets, and held, in overruling the contention

titioner's franchise contract was made, that even the rate provisions of the franchise were contractual and binding, despite the fact that the contract rates themselves might subsequently be changed by exercise of the reserved rate making power.[21] In *Texarkana* v. *Arkansas Gas Co.* 306 U. S. 188, this Court decided that the Texarkana gas franchise there involved was a contract under the Texas law as determined by the Supreme Court of Texas in 1925. The Texarkana franchise was accepted June 18, 1930 (97 F. (2d) 6) and the franchise involved in this cause was accepted May 31, 1930 (R. 12).

In 1902, the Supreme Court held in *Dallas* v. *Dallas St. Ry. Co.*, 95 Tex. 268, 275, that a street railway franchise granted by the city was property assessable for city tax purposes, and the value of the franchise could either be combined with the value of the tangible property, or that the franchise could be "separately assessed and valued as a distinct article of property". This decision has been uniformly followed.[22]

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that the 50 year term of the franchise was unreasonable, that the City's charter powers conferred "upon the city government plenary powers at least to make any contract (otherwise valid) with this company in reference to the establishing and constructing of its street railway, and in express terms contemplates the granting upon the part of the city, by contract or otherwise, the necessary rights and privileges to effectuate this purpose" (p. 554) and that the franchise "grant having been duly accepted and acted upon by appellee, became a vested right or perfected contract which could not be subsequently repealed or impaired by the common council or the authorities of the city of Houston"; 83 Tex. 555, 558. The authority of *Mayor* v. *Houston St. Ry. Co.* was confirmed in 1925 by *Dallas Ry. Co.* v. *Geller*, 114 Tex. 484, 488.

[21] In 1925, the Supreme Court of Texas held in *Dallas Ry. Co.* v. *Geller*, 114 Tex. 484, 488, that Article I, Sec. 17 of the Texas Constitution (copied in footnote 22, 306 U. S. 201) was not an inhibition to contract, but was a reservation of control so far as a rate provision of a franchise was concerned. Accordingly, this Court held that its decisions in *San Antonio* v. *San Antonio Pub. Serv. Co.*, 255 U. S. 547, and *Houston* v. *Southwestern Tel. Co.*, 259 U. S. 318, were no longer applicable, and that in Texas the franchise, including the rate section, is a contract. *Texarkana* v. *Arkansas Gas Co.*, 306 U. S. 188, 198-202.

[22] The actual occupation of streets for railroad purposes pursuant to a franchise ordinance creates an easement which may be assessed with the company's

There has been no decision expressly modifying the Texas law of franchise contract as stated in the *Geller* and *Texarkana* cases, *supra*, or modifying the Texas law of franchise property rights as stated in the cases cited.[23]

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other taxable property "or be separately valued for taxation as a distinct item of property". *T. & P. Ry. Co.* v. *El Paso* (1935), 126 Tex. 86, 94, 95, the opinion quoting and approving the following from *Owensboro* v. *Cumberland Tel. Co.*, 230 U. S. 58, 65:

> "'That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right has been too many times decided by this court to need more than a reference to some of the later cases: * * *'." 126 Tex. 95.

Same holding upon the authority of *T. & P. Ry. Co.* v. *El Paso, supra*, in respect to the street easement occupied by telephone lines: *Ft. Worth* v. *S. W. Bell Tel. Co.* (5th Cir.), 80 F. (2d) 972, 975, wherein the following from *Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649, 661, was quoted and followed:

> "'* * * Such a street franchise has been called by various names, * * * but, howsoever designated, it is property. * * * Being property, it was taxable, alienable, and transferable.' * * *." 80 F. (2d) 975.

In 1935, the Court contrasted the vested right held under a utility franchise with the mere license to use the streets for taxicabs. *Parsons* v. *Galveston*, 125 Tex. 568, 576, 577. A gas franchise was held to be a property right that would support an injunction when sought by the franchise holder against use of the streets by a competitor not similarly authorized. *Northern Tex. Util. Co.* v. *Community Nat. Gas Co.* (C. C. A.) 297 S. W. 904, 908, writ refused Nov. 1927, 118 Tex. 686. In June 1927, Art. 1728 R. C. S., Tex., 1925, which prescribes the jurisdiction of the Supreme Court (conformably to the State Constitution) was amended to include the following:

> "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction."

[23] *Mayor* v. *Houston St. Ry. Co.* (1892), 83 Tex. 548, 555; *Dallas* v. *Dallas St. Ry. Co.* (1902), 95 Tex. 268, 275; *Parsons* v. *Galveston* (1935), 125 Tex. 568, 576, 577; *T. & P. Ry. Co.* v. *El Paso* (1935), 126 Tex. 86, 94, 95. A Texas city can collect rent for property the city holds in trust for public use only by contract, and not by unilateral legislative power. *Macdonell* v. *I. & G. N. Ry. Co.* (1883), 60 Tex. 590, 595.

2.

The purpose of the rental ordinance is not public.

When a Texas city uses (*Ft. Worth* v. *Wiggins* (Com. App.), 5 S. W. (2d) 761, 764, decided in 1928) or grants the use of (*Scroggins* v. *Harlingen* (1938), 131 Tex. 237, 247, 248) public property for local profit and gain, the purpose is proprietary, not governmental. Accord: *Galveston* v. *Posnainsky* (1884), 62 Tex. 118, 127; *Ostrom* v. *San Antonio* (1901), 94 Tex. 523, 525, 526; *Amarillo* v. *Ware* (1931), 120 Tex. 456, 466. This Court recognizes the private capacity in which cities often act. *Vilas* v. *Manila,* 220 U. S. 345, 356.

3.

The ordinance is repugnant to the Federal Constitution.

The ordinance impairs the obligation of the franchise grant and deprives petitioner of all further beneficial use of its franchise. *Boise Water Co.* v. *Boise City,* 230 U. S. 84, 90, 93; *Louisville* v. *Cumberland Tel. Co.,* 224 U. S. 649, 660-665; *Russell* v. *Sebastian,* 233 U. S. 195, 204.[24] This Court held in each of the decisions cited that utility service such as petitioner's cannot be supported by right of way held under a revocable license, and that subsequent legislation having that effect defeats the purpose of the franchise grant.[25]

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[24] In the *Boise* case, the ordinance requiring the water company "to pay a monthly rental for the use of the streets" (p. 90) recognized the outstanding franchise by providing that the ordinance should not be "construed or understood as granting any privilege or authority for any other term than that provided for" in the franchise. 230 U. S. 89. Boise City did not seek to coerce payment of rental by making further operation under the franchise unlawful, but set up the claim for rentals by cross action in a suit brought to recover from Boise City for water service rendered (p. 86).

[25] *Louisville* case, 224 U. S. 661, 663, 664; *Boise* case, 230 U. S. 90, 91; *Russell* v. *Sebastian,* 233 U. S. 204, 206, 207, 210.

Ordinance 129 abolishes franchises for the four types of utility service named and in lieu thereof sets up a revocable license system. Under that system, petitioner keeps only the empty title to its franchise—empty because petitioner cannot operate under the franchise. By paying the rental, petitioner can get the maximum franchise privilege which the rental ordinance permits and this would be true if petitioner had no franchise and was a naked trespasser upon City's streets. This maximum franchise privilege is something less than an annual license; no *absolute* right is given to continue occupancy by paying rental. The authority given by the rental receipt is cancelable by City at any time without notice or cause by refund of the "unearned" portion of the last rental payment, Sec. 7 (R. 16).

Claim that the ordinance is arbitrary is based on *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 92, 97 and *New Jersey Tel. Co.* v. *Tax Board*, 280 U. S. 338, 348, 349 [26] and error from the failure of the State court to determine the Federal question of reasonableness upon *evidence* is predicated upon *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 415, 416.[27]

4.

Petitioner's Federal rights were infringed by the way in which its appeal for constitutional protection of its contract and property rights was determined by the Supreme Court of Texas.

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[26] The gross receipts charge levied by this ordinance does not possess the elements of a street rental charge (148 U. S. 97) and is not a permissible standard of rental value when legislatively imposed (280 U. S. 348, 349).

[27] Much of the evidence relied upon by petitioner to support the Federal question of reasonableness went to the method of measuring the charge. The Supreme Court ruled that the method was not the material inquiry (R. 111). Having so ruled, petitioner contends that the court could not then have examined these evidentiary facts.

The record in the State Supreme Court (R. 106-123) presents a clear case of judicial failure to support and be bound by the Federal Constitution, viz:

1. Of "the authorities above considered" in the original opinion (R. 110), the only decision dealing with street rental charges is the *Dallas Telephone* case (174 S. W. 636), decided by the Dallas Court of Civil Appeals in 1915 on two erroneous theories (a) that Art. I, Sec. 17, Tex. Const. is an inhibition to contract and (b) that imposition of street rental charges is an essential sovereign power. 174 S. W. 639.

2. In the *Geller* case (114 Tex. 484, 488), the "inhibition to contract" theory was expressly denied.[28] The *Geller* case, decided in 1925, is the State law of petitioner's franchise contract made May 31, 1930 (R. 12), as it was of Texarkana franchise contract made June 18, 1930. *Texarkana* v. *Arkansas Gas Co.*, 306 U. S. 199, 200.

3. When the Supreme Court, on rehearing, held that Ordinance 129 imposed a rental charge (R. 115) it was settled that the ordinance was an attempt to exercise proprietary, not sovereign, power. Then the Federal questions of impairment and deprivation became ripe for decision, and their determination was controlled by the decisions of this Court cited *supra* p. 24.

4. Even if the Supreme Court had squarely overruled its prior decisions cited *supra* pp. 22-23, it would not have created a supportable non-Federal ground for its judgment,

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[28] The Supreme Court decided the *Geller* case in 1925 upon writ of error to the Dallas Court to clarify and harmonize the State law because of expressions in the opinion below (245 S. W. 256) which had been construed by the City Attorneys (114 Tex. 487) as confirming the "inhibition to contract" theory on the authority of the *Dallas Telephone* case, the *Altgelt* case (200 U. S. 304, 81 S. W. 106) and the later *San Antonio* case (255 U. S. 547). See *Geller* v. *Dallas Ry. Co.* (1922), 245 S. W. p. 256.

because of the decisions by this Court holding that a State may not, by upholding subsequent infringing legislation by subsequent change of judicial decision, defeat the object of a prior grant, or destroy contracts or take substantial property rights.

5. By upholding the validity of the ordinance without passing expressly upon the Federal questions or else pointing out a non-Federal ground adequate to support the judgment, and by adopting a third course—silence—the State Supreme Court failed to discharge an imperative obligation and denied petitioner its Federal constitutional rights (Art. VI, Cl. 2, 3), *Martin* v. *Hunt's Lessee*, 1 Wheat. 304, 340, 341, 342, 344, 347-349; *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 282.

Prayer.

Petitioner prays that certiorari be granted and, upon submission, for reversal.

Respectfully submitted,

W. P. Hamblen,
F. G. Coates,
Counsel for Petitioner,
Houston Lighting & Power,
Company.

(26)

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FILED
MAR 27 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 805

HOUSTON LIGHTING & POWER COMPANY, *Petitioner*,

v.

CITY OF WEST UNIVERSITY PLACE, ET AL., *Respondent*

BRIEF OF RESPONDENT

Opposing Petition for Writ of Certiorari

SAM DAVIS,
A. J. LAMONTE,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 806

HOUSTON LIGHTING & POWER COMPANY, *Petitioner,*

v.

CITY OF WEST UNIVERSITY PLACE, ET AL., *Respondent*

BRIEF OF RESPONDENT

Opposing Petition for Writ of Certiorari

STATEMENT OF THE CASE

The Summary Statement of the Petitioner on page 2 of its Petition for Writ of Certiorari is substantially correct. However, the statement of the Petitioner on Page 1 of such petition to the effect that the Supreme Court of Texas has rendered final judgment in favor of the validity of Ordinance 129 of the City of West University Place, Texas, overruling all questions raised and denying all rights set up and claimed under the Federal Constitution by Petitioner against said ordinance, might be misleading in part. The fact is, the Supreme Court of Texas never found it necessary to pass upon

the alleged Federal questions raised because it evidently did not consider that such questions raised by the Petitioner were substantial in character. The decision of the Texas Supreme Court was predicated upon the inquiry as to the reasonableness of the ordinance in question, and the court held that it was not so unreasonable as a matter of law, as to render it invalid (R. 111).

The statement of the case in the supporting brief of the Petitioner, Pages 15-19 of the Petition for Writ of Certiorari, is substantially correct. We think it unnecessary to add thereto.

BRIEF OF ARGUMENT

Summary of Argument

1. The alleged constitutional questions relied upon by Petitioner, are not and were not substantial in character; but on the contrary, were too flimsy and unsubstantial to merit the attention of the Supreme Court of Texas which based its decision upon other and controlling grounds.

2. Although the record may show that the Petitioner contended and claimed that the judgment of the Supreme Court of Texas impaired the obligation of a contract, and violated the provisions of the CONSTITUTION OF THE UNITED STATES, and although Petitioner avers in its Petition for Writ of Certiorari that "The Supreme Court of Texas, the highest court of the state, has rendered final judgment in favor of the validity of Ordinance 129 of the City of West University Place, Texas, overruling all questions raised and denying all rights set up and claimed under the FEDERAL CONSTITUTION by Petitioner against said ordinance," it does not appear that any Federal question was both raised *and actually decided*, and that the court's decision was necessary to the de-

termination of the cause, or that the judgment rendered could not have been given without deciding it.

3. The Supreme Court of Texas properly held that the ordinance in question was not so unreasonable as a matter of law as to render it invalid. It is well established that the reasonableness or unreasonableness of such an ordinance is a matter for the determination of the courts.

4. The burden is on the Petitioner to overcome the presumption of facts supporting constitutionality, which attaches to all legislative acts; and this Honorable Court will not assume that the rental charge in question is excessive so as to make the ordinance in question unreasonable and void.

5. The ordinance in question does not impair the obligation of contracts because the franchise in question was granted and accepted under the Texas law as contained in Art. I, Sec. 17 of the CONSTITUTION OF TEXAS prohibiting the irrevocable or uncontrollable grant of special privileges or immunities, which provision must necessarily be read into the franchise in question.

6. The ordinance in question is not repugnant to Sec. 1 of the Fourteenth Amendment to the FEDERAL CONSTITUTION in that

(a) Its enactment and enforcement does not deprive Petitioner of the use of its franchise without due process of law;

(b) The franchise was at all times subject to modification and regulation by the City of West University Place, as it otherwise would constitute an irrevocable or uncontrollable grant of a special privilege or immunity in violation of Sec. 17 of the Bill of Rights (Art. I), of the TEXAS CONSTITUTION;

(c) The rental charge provided for in the ordinance in question was and is reasonable—certainly not so unreasonable as to render the ordinance invalid.

ARGUMENT

1.

The alleged constitutional questions relied upon by the Petitioner, are not and were not substantial in character; but on the contrary, were too flimsy and unsubstantial to merit the attention of the Supreme Court of Texas which based its decision upon other and controlling grounds.

It is well settled that the Supreme Court of the United States will decline jurisdiction, although the constitutionality of a state law is formally drawn in question, when it appears that the constitutional question raised is not, and was not, at the time of granting the writ, substantial in character. ZUCHT v. KING, 260 U.S. 174; 67 L. Ed. 194. SUGARMAN v. UNITED STATES, 249 U.S. 182; 63 L. Ed. 550.

Long before this suit was instituted CITY OF ST. LOUIS v. WESTERN UNION TELEGRAPH COMPANY, 148 U.S. 92, 37 L. Ed. 380, had settled that a city has a right to charge a telegraph company for the use of its streets and public places for telegraph poles erected therein. In such case, this Court further held, that prima facie such an ordinance was reasonable. As stated in the opinion of MR. JUSTICE BREWER:

> "The court cannot assume that such a charge is excessive, and so excessive as to make the ordinance unreasonable and void; for, as applied in certain cases, a like charge for so much appropriation of the streets may be reasonable."

In the instant case, the charge made by the City of West University Place under the ordinance in question, was based

upon the amount of service rendered and electricity furnished within the corporate limits of the city itself. It is respectfully submitted that a fairer method of imposing a charge for the use of the city's streets could hardly be found, as such charge would be determined by the gross earnings of the company, which in turn would be based upon the amount of service actually used in the city.

While the charge in question is in the nature of a rental for the use of the streets and other property of the city, it is submitted that there is no practical difference between it and franchise taxes imposed upon a utility in so far as the method of estimating and determining the charge is concerned. It has been held by this Honorable Court that a local law imposing a franchise tax measured by gross income, against "utilities", did not deny equal protection or due process of law to transit corporations, notwithstanding that they were subject to competition from city transit lines and taxicabs and had a smaller margin of profits than other utilities and contractural inhibitions against raising fares. NEW YORK TRANSIT CORPORATION v. CITY OF NEW YORK, 58 S. Ct. 721, 303 U.S. 573, 82 L. Ed. 1024. BROOKLYN & QUEEN'S TRANSIT CORPORATION v. CITY OF NEW YORK, 58 S. Ct. 721, 303 U.S. 573, 82 L. Ed. 1024. [1]

[1]A state tax on the annual gross earnings of railroads held to be a property tax, is valid. GREAT NORTHERN RAILWAY COMPANY v. STATE OF MINNESOTA, 49 S. Ct. 191, 278 U.S. 503, 73 L. Ed. 477.

It has been held that an ordinance imposing an annual license tax on the privilege of carrying on a telephone business of Four (4%) per cent of the gross income of the business in the city during the preceding fiscal year, was not so vague and indefinite as to infringe due process of law. PACIFIC TELEPHONE AND TELEGRAPH COMPANY v. CITY OF SEATTLE, 54 S. Ct. 383, 291 U.S. 300, 78 L. Ed. 810.

See also NEW YORK RAPID TRANSIT CORPORATION v. CITY

In the instant case, counsel for Petitioner, filed in the Supreme Court of Texas a motion to certify that Federal Constitutional questions were raised, entertained and overruled (R. 120 and 121). The Respondent herein duly filed a contest to such motion, and among other things, stated that in reality no Federal Constitutional questions were presented by the facts of this case (R. 122, 123). On January 22, 1941, the Supreme Court of Texas overruled the motion to certify, thereby in effect finding and holding that in reality no Federal Constitutional questions, at least of a substantial nature, are presented by the facts of the instant case (R. 122-123).

The franchise in question was granted to the Petitioner by the City of West University Place and accepted in May, 1930. It was thus granted and accepted under Sec. 17, Art. I of the CONSTITUTION OF TEXAS which provides that no irrevocable or uncontrollable grant of special privileges or immunities, shall be made. In SAN ANTONIO TRACTION COMPANY v. ALTGELT, 200 U.S. 304, 50 L. Ed. 491, this Honorable Court sustained the Civil Court of Appeals of Texas (SAN ANTONIO TRACTION COMPANY v. ALTGELT, 81 S.W. 106) in a construction of such constitutional provision, and in substance held that the franchise of the San Antonio Street Railway, even if construed as a contract, was still subject to such Constitutional provision, and that, therefore, such franchise was subject to further legislative control on the part of the City of San Antonio.

We respectfully submit that the ALTGELT case is conclusive of the matter, and that under such decision, which has never

OF NEW YORK, 9 N.E. (2d) 858, 275 N.Y. 258, followed in BROOKLYN AND QUEEN'S TRANSIT CORPORATION v. CITY OF NEW YORK, supra, in which a statute imposing a Three (3%) per cent gross income tax by the City of New York against transit companies, was held not to be so burdensome as to constitute taking property without due process of law.

been departed from by this Court, there can be no Federal question, and certainly no Federal question of a substantial nature, involved in the instant suit.

To like effect are CITY OF HOUSTON v. SOUTHWESTERN BELL TELEPHONE CO., 259 U.S. 318, 66 L. Ed. 961; CITY OF SAN ANTONIO v. SAN ANTONIO PUBLIC SERVICE CO., 255 U.S. 547, 65 L. Ed. 777 (affirming 257 Fed. 467); CITY OF TEXARKANA, TEXAS v. ARKANSAS-LOUISIANA GAS CO., 306 U.S. 188, 83 L. Ed. 598.

Clearly under these decisions, there is no Federal question of a substantial nature to be decided in the instant case, since the contention of Petitioner has been repeatedly determined adversely to it by this Court.

2.

Although the record may show that the Petitioner contended and claimed that the judgment of the Supreme Court of Texas impaired the obligation of a contract, and violated the provisions of the CONSTITUTION OF THE UNITED STATES, and although Petitioner avers in its Petition for Writ of Certiorari that "The Supreme Court of Texas, the highest court of the state, has rendered final judgment in favor of the validity of Ordinance 129 of the City of West University Place, Texas, overruling all questions raised and denying all rights set up and claimed under the FEDERAL CONSTITUTION by Petitioner against said ordinance," it does not appear that any Federal question was both raised *and actually decided*, and that the court's decision was necessary to the determination of the cause, or that the judgment rendered could not have been given without deciding it.

The case of HONEYMAN v. HANAN, 300 U.S. 14; 81 L. Ed. 476, is controlling. In this case, in which the opinion was written by MR. CHIEF JUSTICE HUGHES, it is held that before the Supreme Court of the United States may undertake

to review a decision of a court of a state, it must appear affirmatively from the record, not only that the Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause. In the instant case, it does not appear from the record or otherwise that the decision of a Federal question was necessary to the determination of the cause, and that such Federal question was actually decided, or that the judgment as rendered could not have been given without deciding it.

See BROWN v. ATWELL, 92 U.S. 327, 23 L. Ed. 511, referred to by MR. CHIEF JUSTICE HUGHES in HONEYMAN v. HANAN, supra, in which this Honorable Court laid down the rule:

> "We have often decided that it is not enough to give us jurisdiction over the judgments of the state courts for the record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."[1]

In MCGOLDRICK v. COMPAGNIE GENERAL TRANSATLANTIQUE, 309 U.S. 430-435; 84 L. Ed. 849, this Honorable Court through MR. JUSTICE STONE stated:

> "But it is also the settled practice of this court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the Federal courts, that it considers questions urged by a

[1]To like effect see COMMERCIAL NATIONAL BANK v. BUCKINGHAM, 5 How. 341, 12 L. Ed. 180; LAWLER v. WALKER, 14 How. 154, 14 L. Ed. 366; Miss. & M. R. Co. v. ROCK, 4 Wall. 177, 18 L. Ed. 381; PARMELEE v. LAWRENCE, 11 Wall. 38, 20 L. Ed. 49.

> petitioner or appellant not pressed or passed upon in the courts below."

This Court in the same case further said in substance that in cases coming to the Supreme Court of the United States from the state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force "which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review."

3.

The Supreme Court of Texas properly held that the ordinance in question was not so unreasonable as a matter of law as to render it invalid. It is well established that the reasonableness vel non of such an ordinance is a matter for the determination of the courts. FLEMING, ET AL., v. HOUSTON LIGHTING & POWER COMPANY, 138 S.W. (2d) 520 (R. 111); STATE v. CITY OF LARAMIE, 275 P. 106, 40 Wyo. 74; EX PARTE HALL, 195 P. 975, 50 Cal. App. 786.

The charge based upon Four (4%) per cent of the gross revenues of the Petitioner's business within the city is not arbitrary or excessive. Both the amount of the charge and the method of arriving at it, are, we submit, reasonable. It is a matter of common knowledge that rentals are frequently based upon a percentage of the gross earnings of the tenant. This method is gaining in popularity, because it is becoming an accepted fact that this basis presents a fair and reasonable method of computing the charge.

The ordinance in question calls for a rental of Four (4%) per cent of the gross earnings of the Petitioner. The payment required by the ordinance in controversy does not constitute a charge for the privilege of doing business. The Petitioner has the right and power to acquire private easements on the rear of the various lots within the city and move its poles on

these private easements and continue with its business. It could thus continue its business without the ordinance in controversy having any application. A similar situation is presented in CITY OF ST. LOUIS v. WESTERN UNION TELEGRAPH COMPANY, supra. In that case a Five and 00/100 ($5.00) Dollars charge was imposed for each and every telegraph or telephone pole erected or used in the streets, alleys and public places in the city. It was contended that a charge of Five and 00/100 ($5.00) Dollars per pole was grossly excessive and that such charge was for the privilege of doing business within the city. This Court held, however, that the charge was more in the nature of a charge for the use of property belonging to the city and that the city was seeking to collect rent.

In SOUTHWESTERN TELEGRAPH AND TELEPHONE COMPANY v. CITY OF DALLAS, 174 S.W. 636, error refused, certiorari dismissed by the Supreme Court of the United States, the ordinance of the City of Dallas levying a charge of Two and 00/100 ($2.00) Dollars per pole and Twenty-five (25c) cents per wire per mile was declared to be a rental charge for the use of the streets. This was likewise held in MUNICIPAL GAS COMPANY v. CITY OF WICHITA FALLS, 88 S.W. (2d) 608, wherein there was in controversy a practically identical ordinance levying a rental charge based upon Five (5%) per cent of the gross income of the utility from its business within the city. In TULANE COUNTY v. CITY OF DENUBA (Cal.), 206 Pac. 983, it was held that the imposition of a gross receipts charge by a municipality for the privilege of using its streets was not a tax, but was a charge in the nature of a rental. There are numerous other authorities holding that a gross receipts charge for the use of the streets of a city does not constitute a tax but a rental charge.

There is no basis, we submit, for any differentiation between a rental charge based upon a percentage of the gross

earnings of the company and a charge of Five and 00/100 ($5.00) Dollars per pole and a certain designated amount for each mile of wire within the city as in the case of SOUTHWESTERN TELEGRAPH AND TELEPHONE COMPANY v. CITY OF DALLAS, supra. The Supreme Court of Texas in the instant case in its opinion clearly shows that the material inquiry is not the method used to measure the rental charge but rather the reasonableness of such charge.[1]

Certainly there is nothing to show that the charge of Four (4%) per cent of the gross earnings of the Petitioner is unreasonable. In TULANE COUNTY v. CITY OF DENUBA, supra, a Two (2%) per cent annual gross receipts rental charge was made. In MITCHELL v. DAKOTA CENTRAL TELEPHONE COMPANY, 25 S.D. 409, 127 N.W. 582, the Supreme Court of South Dakota held that a payment of Ten (10%) per cent of the gross receipts from the company's business was not a tax nor a license but was in the nature of a rental or compensation for the use of the streets. It is manifest in the instant case that Petitioner has utterly failed to show that the Four (4%) per cent charge is unreasonable.

4.

The burden is on the Petitioner to overcome the presumption of facts supporting constitutionality, which attaches

[1] (R. 111). "We have also concluded that the ordinance is not invalid merely because it provides for measuring the amount of the rental charge by a percentage (4%) of the gross receipts of the business tranacted by the company in the city. In the case of Municipal Gas Company v. City of Wichita Falls, 88 S.W. (2d) 608, an ordinance was upheld which measured the charge by a 5% of the gross receipts . . . It is thus established that the material inquiry is not the method to use to measure the rental charge, but rather the reasonableness of such charge." FLEMING, ET AL, v. HOUSTON LIGHTING & POWER CO., 138 S.W. (2d) 520.

to all legislative acts. LAWRENCE v. STATE TAX COMMISSION, 286 U.S. 276-283, 76 L. Ed. 1103. This Honorable Court, we respectfully submit, will not assume that the rental charge in question is excessive so as to make the ordinance in question unreasonable and void. CITY OF ST. LOUIS v. WESTERN UNION TELEGRAPH COMPANY, 13 S. Ct. 485, 148 U.S. 92, 37 L. Ed. 380.

5.

The ordinance in question does not impair the obligation of contracts because the franchise in question was granted and accepted under the Texas law as contained in Art. I, Sec. 17 of the CONSTITUTION OF THE STATE OF TEXAS prohibiting the irrevocable or uncontrollable grant of special privileges or immunities and such Constitutional provision must necessarily be read into such franchise or contract. The Petitioner received its franchise under the Texas Constitution of 1876, Sec. 17, Art. I, which reads as follows:

> "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the legislature or created under its authority shall be subject to the control thereof."

There can be no doubt but that the franchise granted by the City of West University Place to the Petitioner is in legal acceptation a special privilege. MAYOR OF THE CITY OF HOUSTON v. HOUSTON STREET RAILWAY COMPANY, 19 S.W. 127, 129, decided by the Supreme Court of Texas.

By virtue of Art. I, Sec. 17 of the CONSTITUTION OF

TEXAS, no irrevocable or uncontrollable grant of special privileges or immunities shall be made. This constitutional provision has been construed many times by the Supreme Court of Texas and has also been construed by the Supreme Court of the United States, and both courts have uniformly held that the foregoing provision of the Constitution of this State precludes a City from making any irrevocable grant of a franchise or a special privilege.

In SAN ANTONIO TRACTION COMPANY v. ALTGELT, supra, this Honorable Court held in substance that assuming that the ordinance of March 16, 1899, extending the franchise of the San Antonio Street Railway, and imposing certain limitations, constituted a contract pro tanto, the question still remained whether the provision that said street railway company shall charge Five (5c) cents fare for one (1) continuous ride over any of their lines, with one (1) transfer to or from either line to the other, constituted a contract with respect to which no further legislation upon that subject could be enacted without impairing its obligation. The Court then proceeded to hold that even if construed as a contract, it was still subject to a provision of the Texas Constitution of 1876, which in Sec. 17 of the Bill of Rights, declares that no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but that all privileges granted by the legislature or created under its authority shall be subject to the control thereof. This Court further held that the municipality received its franchise under the Constitution of 1876, and that it was not deprived of that control by the fact that the contract was not entered into by the legislature itself, but by a municipal corporation, since a municipal corporation is but an agency of the state, to which is delegated the power to regulate street railways and other municipal franchises.

It is manifest that in the instant case the franchise in ques-

tion as well as the city ordinance must be construed under and in light of the TEXAS CONSTITUTION OF 1876. Hence it follows that such franchise was under further legislative control of the City of West University Place.

The Supreme Court of the United States has never digressed from its construction of Art. I, Sec. 17 of the CONSTITUTION OF TEXAS as indicated in the ALTGELT case. This being true, a franchise granted by a municipality is subject to further legislative control, without violating the constitutional provision forbidding the impairment of the right of contract.[1]

[1]In SAN ANTONIO TRACTION COMPANY v. ALTGELT, 200 U.S. 304, 50 L. Ed. 491, the Supreme Court of the United States, in affirming the judgment of the TEXAS COURT OF CIVIL APPEALS, 81 S.W. 106, in the opinion written by MR. JUSTICE BROWN stated, "Assuming, but not deciding, that the ordinance of March 16, 1899, extending the franchise of the San Antonio Street Railway, and imposing certain limitations, constituted a contract pro tanto the question still remains whether the provision 'that said street railway companies shall charge 5 cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other,' constituted a contract with respect to which no further legislation upon that subject could be enacted without impairing its obligation. Even if construed as a contract, it was still subject to the provision of the Constitution of 1876, which in Section 17 of the Bill of Rights, declared that no irrevocable or uncontrollable grant of special privileges or immunities should be made; but that all privileges granted by the Legislature or created under its authority shall be subject to the control thereof.

"An important consideration in this connection is that the alleged contract was made twenty-three years after the Constitution of 1876 was adopted, declaring that all privileges granted by the legislature shall be subject to its control. Clearly, it was not deprived of that control by the fact that the contract was not entered into by the Legislature itself,

It is respectfully submitted that the case of SAN ANTONIO TRACTION CO. v. ALTGELT, is controlling of the instant case and is a complete answer to the contention of the Petitioner.

In the case of CITY OF HOUSTON v. SOUTHWESTERN BELL TELEPHONE COMPANY, 259 U.S. 318, 66 L. Ed. 961, the same rule is declared in the use of this language:

> "It has been definitely decided that, while municipal corporations in Texas, as agencies of the state, may have the power to prescribe rates for public service corporations, this provision of the Constitution (Sec. 17, Art. I) prohibits their making contracts for the future which may not be modified at any time by appropriate action of the municipality."

This Honorable Court again had occasion to construe this provision of the Texas Constitution. It was in the case of the CITY OF SAN ANTONIO v. SAN ANTONIO PUBLIC SERVICE

but by a municipal corporation, since that is but an agency of the state, to which is delegated the power to regulate street railways and other municipal franchises.

"We are clearly of the opinion that, under these circumstances, it received its franchise under the Constitution of 1876, which forbade either the Legislature or the municipal authorities to make any irrevocable contract.

"It is true that in this ordinance it was provided that all rights and privileges previously granted to the street railway company and the Edison company were conferred unto the traction company, including all the limitations, contracts, and obligations; but this ordinance must be construed in connection with the Constitution of 1876, which made all such privileges and franchises subject to the control thereof. Such was the view taken by the Court of Civil Appeals of Texas in this case, which expressly waived the question whether the provisions of the former ordinance fixing a five cents fare constituted a contract or not, declaring that if it did, it was subject to further legislative control."

COMPANY, 255 U.S. 547, 65 L. Ed. 777 (affirming 257 Fed. 467). This Court in that case re-affirmed the proposition that Art. I, Sec. 17 of the Constitution of Texas prohibits the city from granting a special privilege which it cannot thereafter impair by future regulation.

In the case of STORRIE v. STREET RAILWAY COMPANY, 46 S.W. 796, decided by the Supreme Court of Texas, it is held that under Art. I, Sec. 17 of the Constitution of Texas, the Legislature had the right to amend the Houston City Charter so that a street car company became liable for the cost of paving six (6) inches on each side of its tracks in addition to its former liability of paving between the rails, and such law was not unconstitutional as impairing the obligation of a contract.

The latest announcement of this Honorable Court on this question is that contained in the opinion rendered by this Court in the case of CITY OF TEXARKANA v. ARKANSAS-LOUISIANA GAS COMPANY, 306 U.S. 188, 83 L. Ed. 598. MR. JUSTICE REED delivered the opinion of this Court, and the doctrine repeatedly announced by the Supreme Court of Texas that a franchise granted by a city is subject to modification without impairing the obligation of a contract by virtue of the reserved power given in Art. I, Sec. 17 of the Texas Constitution, is expressly approved. MR. JUSTICE REED very forcibly says that in Texas every utility company accepts its franchise with full knowledge that the municipality granting it reserves the power of future regulation. In this connection, he says:

> "The utility was chargeable with notice in 1930 of the rule in Texas, re-stated in the Texarkana Charter, that rate regulatory power remains in the municipality and the charter provision to that effect was reserved in the franchise by force of law."

From the foregoing language, it is clear that the ordinance

in question cannot be held to impair the obligation made by the City in granting the Petitioner a right to use its streets because the power to modify or alter such grant was necessarily reserved to the City by the express terms of the organic law of the State of Texas, and the Petitioner was chargeable with notice of this reserved power.

The principal case relied upon by Petitioner is that of RUSSELL v. SEBASTIAN, 233 U.S. 195, 58 L. Ed. 912. The basis for distinguishing that case from the case now before this Court is perfectly clear. It is this: In that case, the contract granting the gas company a franchise to use the city streets, which it was held could not be subsequently impaired, was made by a provision of the Constitution of the State of California. The contract was duly accepted by the gas company and large expenditures were made by it in carrying out its part of the contract. No character of regulation or control was reserved to the state or municipal authorities, except to regulate taxes. Subsequently the provision of the Constitution was amended and the city, acting thereunder, attempted by ordinance to prevent the gas company laying its pipes in the streets without having obtained a further grant from the city. Of course, it was held that the people of California through the supreme law of the state had made a solemn contract with the gas company which it could not later amend by adopting another constitutional provision. The State of California had no provision in its constitution like that in Texas hereinabove set out. It is submitted that this Court could not have reached any other conclusion in RUSSELL v. SEBASTIAN than that a contract made by the people of a state through the supreme law, the Constitution itself, was binding on both parties and could not later be abrogated or impaired by subsequent enactment.

In this state, a utility company cannot be misled into relying upon the grant of its franchise being irrevocable. It must

take notice that the state and all of its municipal subdivisions are expressly prohibited by the Organic law of the state from making any "uncontrollable grant of special privileges or immunities" and that "all privileges and franchises granted by the Legislature or created under its authority" are expressly subject to subsequent control.

The decisions of the courts in construing Art. I, Sec. 17 of the Texas Constitution make it perfectly plain that the franchise granted by the City of West University Place to the Petitioner, Houston Lighting & Power Company, cannot be given the effect to vest in the Power Company an irrevocable and uncontrollable right to keep and maintain its poles upon the streets of the City forever free from every kind and character of regulation which the governing body of the City might deem advisable in the interest of the public welfare.

6.

The ordinance in question is not repugnant to Sec. I of the Fourteenth Amendment to the Federal Constitution in that

(a) Its enactment and enforcement does not deprive Petitioner of the use of its franchise without due process of law;

(b) The franchise was at all times subject to modification and regulation by the City of West University Place, as it otherwise would constitute an irrevocable or uncontrollable grant of a special privilege or immunity in violation of Sec. 17 of the Bill of Rights (Art. I), of the TEXAS CONSTITUTION;

(c) The rental charge provided for in the ordinance in question was and is reasonable—certainly not so unreasonable as to render the ordinance invalid.

This Honorable Court in SAN ANTONIO TRACTION COMPANY v. ALTGELT, supra, and other cases cited, has held that under the Texas Constitution, Art. I, Sec. 17, a franchise granted by a municipality is subject to further legislative control without impairment of the obligation of a contract since the contract would have to be construed under such constitutional provision. This being true, the ordinance in question, imposing a rental charge upon the Petitioner for the use of the streets and other property of the city, does not constitute taking property without due process of law in violation of Sec. I of the Fourteenth Amendment.

The question then resolves itself into the reasonableness vel non of the ordinance, and we respectfully submit that there is no evidence that such ordinance is unreasonable, and certainly this Honorable Court will not assume that it is. ST. LOUIS v. WESTERN UNION TELEGRAPH COMPANY, supra.

Counsel for Petitioner say on Page 25 of their supporting brief that "by paying the rental, Petitioner can get the maximum franchise privileges which the rental ordinance permits, and this would be true if Petitioner had no franchise and was a naked trespasser upon City's streets." This is certainly not a correct statement of the fact. The Petitioner still has its franchise and it has the right to operate thereunder. It has not been deprived of its franchise—it is merely charged a rental for the use of the City's streets. It could operate without use of the City's streets. The Petitioner has the statutory right and power to condemn property for its use. If it sees fit, it can certainly exercise its legal rights in this respect and acquire property for the purpose of placing its poles thereon and in this manner proceed with its business within the city without paying any rental whatever. The ordinance in question simply provides that every person, etc., "occupying or using the streets, highways, easements, alleys, parks or other public places," in the City, "with poles, pipe

and other fixtures" shall as a condition to such further occupancy of such streets, highways, etc., pay rental equal to Four (4%) per cent of the gross receipts received from its business within the city. The occupancy of the streets, etc., by the poles of the light company is the basis and only basis, for the rental. If the Petitioner places its poles off the public streets, highways, easements, alleys, parks or other public places within the city, as indicated by the Petitioner's own witness could be done (R. 86), and which the Petitioner has the legal right to do by the condemnation or acquisition of property, if not otherwise, the Petitioner could then continue its business and avoid payment of all rental. It is very plain that the rental is based, as stated, upon an appropriation by the Petitioner of a portion of such public streets, highways, easements, alleys, parks or other public places. It is thus seen that there is no basis for the attempted differentiation between the instant case and CITY OF ST. LOUIS v. WESTERN UNION TELEGRAPH COMPANY, supra.

While there are numerous cases which hold that a rental based upon gross receipts instead of a flat rate, forms a proper rental charge, we have failed to find, and counsel for Petitioner have failed to cite a single case wherein a rental has been held not a rental or unreasonable just because the method in arriving at the amount of such rental is based upon the gross receipts of the business instead of a flat rate per pole[1].

[1]In CITY OF SPOKANE v. SPOKANE GAS AND FUEL COMPANY (Cal.), 26 Pac. (2d) 1034, where the court had under consideration a franchise which gave the city the right to fix a gross receipts charge for the use of the streets, and pursuant thereto, the city had passed an ordinance providing for 2% gross receipts charge, it was said, "Such charges as these have been quite generally held to be in the nature of rental for the use and occupancy of the streets (citing numerous authorities). The correct rule as stated under the title "Telegraphs and telephones (62 CORPUS JURIS, page

Respondent prays that certiorari be denied and in the alternative for affirmance.

Respectfully submitted,

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47) distinguished from tax and license fee. A charge imposed upon a company for the use of the streets, by whatever name it may be called, is of the nature of rental or compensation, and is not a tax on the company, its property, or the privilege of doing business nor is it of the nature of a license fee to cover the expense of regulation and supervision, but is imposed by virtue of the proprietary right, rather than of any governmental power of the state or municipality."

In McQUILLIN, MUNICIPAL CORPORATIONS, Second Edition, Volume 4, Section 1772, it is said: "A municipal corporation, having entire control of its streets and power to impose conditions on granting a franchise to use the streets, may require compensation for their use by public service companies, as a condition of the grant of the right to use them, unless forbidden by statute, AS BY REQUIRING THE COMPANY TO PAY A CERTAIN PORTION OF ITS RECEIPTS AS COMPENSATION FOR THE USE OF STREETS * * * "

See CITY OF MEMPHIS v. POSTAL TELEGRAPH CABLE COMPANY, 145 Fed. 602, decided by the Circuit Court of Appeals, Sixth Circuit; CITY AND COUNTY OF DENVER v. STENGER, 295 Fed. 809 (Circuit Court of Appeals, Eighth Circuit), holding that the charge for the use of the streets was in the nature of a rental and not a tax.